No. 80-251

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# In the Supreme Court of the United States

OCTOBER TERM, 1980

BERNARD ROSTKER, DIRECTOR OF SELECTIVE SERVICE, APPELLANT

*v.*

ROBERT L. GOLDBERG, ET AL.

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA*

## REPLY BRIEF FOR THE APPELLANT

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## REPLY BRIEF FOR THE APPELLANT

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1. Much ink has been spilled on the question what level of scrutiny should govern judicial consideration of this case. Lest our primary submission on this point be lost in the war of words, we restate it without embellishment: Because the challenged classification is based on national defense needs, the broad deference due Congress when it legislates in the military context demands the application of nothing stricter than the rational relationship test. See our opening brief at 15-20.[1]

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[1] Appellees would disregard the precedents requiring deferential review of military and defense-related actions on the ground (Br. 19), *inter alia*, that "[p]ersons called upon

2. As we discussed in our opening brief (at 21-23), application of the rational relationship test, rather than an intermediate level of scrutiny, is additionally warranted because, *inter alia*, the classification is based not on gender alone, but rather on the unchallenged ineligibility of women to be utilized in combat. Appellees respond both that the classification is not based on combat-eligibility and that, even if it were, an intermediate level of scrutiny nonetheless would be required. We address these contentions in turn.

a. First, as is apparent from the legislative history discussed in our opening brief (at 29-31), Congress' main reason for restricting draft registration to men was its belief that the primary demand on the induction system in a modern mobilization scenario would be for combat replacements, particularly

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to register are, by definition, civilians." This Court, however, has recognized the deference due Congress specifically in the context of civilians and the Selective Service System. *United States* v. *O'Brien*, 391 U.S. 367 (1968). Moreover, as we pointed out in our opening brief (at 3, 26) and as the district court recognized (J.S. App. 21a), the registration and conscription provisions of the Military Selective Service Act are interlocked; registration is, in effect, the first step of the induction process. In turn, the determination of who shall be inducted in the event of a mobilization necessarily implicates the question of "who shall serve [in the Armed Forces] and in what way" (*United States* v. *MacIntosh*, 283 U.S. 605, 622 (1931)) and "complex, subtle, and professional decisions as to the composition * * * and control of a military force * * *" (*Gilligan* v. *Morgan*, 413 U.S. 1, 10 (1973)). In these circumstances, appellees' response is of a kind with the argument that voting discrimination presents only a "political question," and it merits the same short treatment as "little more than a play upon words." *Nixon* v. *Herndon*, 273 U.S. 536, 540 (1927).

replacements in combat specialties that are closed to women under current law and policy. In other words, Congress' expressed intent was to classify on the basis of combat eligibility.

Second, as we also showed in our opening brief (at 21-23 & n.22), the *effect* of Congress' focus on combat-eligibility is similarly gender-neutral, in that men who are unfit for combat are weeded out at subsequent stages of the induction process. Appellees challenge this analysis by suggesting, on the basis of Army regulations that would allow for the relaxation of physical standards for induction during a mobilization, that men would be inducted in the event of a mobilization without regard to their combat eligibility (Br. 9-12). Appellees' understanding of the Army regulations is incorrect.

Under the Army's physical standards regulations, selective service registrants subject to induction are given physical examinations, and each of six designated body functions (abbreviated as PULHES)[2] is assigned a rating ranging from "1" (best condition) to "4" (worst condition) (AR 40-501, ¶ 9-3*c*). The series of ratings constitutes a physical "profile." All service members periodically are reexamined and their profiles updated. AR 40-501, ¶¶ 9-2, 9-3 and 9-5. Individuals with profiles including only "1's" and "2's" are considered "combat fit" and, at the least, are considered to have no significant assignment limitations. AR 40-501, ¶ 9-5 Chart. Generally, only individuals in this category are subject to induction. See AR 40-501, ¶¶ 9-3*c*, 9-5 Chart. Appellees, however, focus on the Chapter 6 (mobilization medical fitness)

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[2] P=physical capacity or stamina; U=upper extremities; L=lower extremities; H=hearing and ear; E=eyes; S=psychiatric. AR 40-501, ¶ 9-3*b*.

standards and on AR 40-501, ¶ 9-3*c*(3). That paragraph provides (emphasis added):

> A profile containing one or more numerical designations "3" signifies that the individual has medical condition(s) or physical defect(s) which require certain restrictions in assignment within which the individual is physically capable of performing full military duty. Such individuals are not acceptable under procurement (entry) standards in time of peace, but *may be acceptable in time of partial or total mobilization.* They meet the retention standards, while in service, but should receive assignments commensurate with their functional capability.

Appellees apparently assume both that whenever there is a mobilization Chapter 6 standards obtain and that men in the "profile 3" group—whom appellees perceive as unfit for combat assignment (but see page 7 & note 6, *infra*)—are automatically subject to induction.

But Chapter 6 standards do not apply automatically in the event of a partial or total mobilization. Rather, as AR 40-501, ¶ 6-2 explains, "[t]hese [mobilization medical fitness] standards will be implemented only upon specific instruction from the Service Secretaries, and will apply to personnel categories as directed." Similarly, ¶ 9-3*c*(3) does not provide that profile 3 registrants shall be, will be or "*are* inductible" in the event of a mobilization (Appellees' Br. 10; emphasis in original). Rather, it states only that "profile 3" registrants "may be acceptable" in such circumstances. Whether any profile 3 registrant would be inducted turns on AR 40-501, ¶ 6-2, quoted above. Thus, unless a special Chapter 6 directive is issued by the Service Secretaries, physical stand-

ards for induction are governed—during partial mobilization, wartime or otherwise—by Chapter 2 of AR 40-501 (appellees do not dispute that that chapter excludes individuals not physically qualified for combat training and deployment).[3]

Appellees suggest (Br. 10), however, that a relaxation to Chapter 6 standards during wartime is mandated by 50 U.S.C. App. 454(a), which provides that "the minimum standards for physical acceptability established pursuant to this subsection shall not be higher than those applied to persons inducted * * * in January 1945." But that statute requires no such relaxation, since the Chapter 2 standards more closely resemble the standards that were in effect in 1945 than do the less rigorous Chapter 6 standards. Compare AR 40-501, Chapter 2, with Standards of Physical Examination During Mobilization, 19 April 1944 (*reprinted in* Medical Department, United States Army, *Physical Standards in World War II*, Appendix B at 161-207 (1967)). AR 40-501, Chapter 6, thus embodies contingency standards, rather than the 1945 standards, as appellees apparently assume.

Thus, despite the fact that the Korean War and the Vietnam conflict were "partial mobilizations,"[4]

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[3] While the point barely merits a footnote, we note that, contrary to appellees' assertion (at 10 & n.26), under both the Chapter 2 and the Chapter 6 standards certain types of flatfootedness constitute grounds for rejection from service. The Chapter 6 standards, however, refer to the condition by its Latin name, *pes planus*. AR 40-501, ¶ 6-11*c*(2).

[4] *The Department of Defense Dictionary of Military and Associated Terms*, Joint Chiefs of Staff Publication No. 1, at 254 (1 June 1979), defines "partial mobilization" as an "[e]xpansion of the active Armed Forces (short of full mobiliza-

and therefore potentially subject to the application of Chapter 6 entry standards pursuant to ¶ 9-3*c* (3), those drafts were governed by Chapter 2 standards alone.[5] Nor is there reason to anticipate that there would be a relaxation of entry standards in the event of a conflict in the near future, particularly in view of the evidence before Congress that a modern mobilization would be a more selective mobilization (see our opening brief at 36), Congress' express judgment that a modern draft would serve primarily to supplement our standing volunteer army with combat and combat support personnel (*id.* at 29-30), and the fact that there is presently available a relatively large pool of militarily eligible men (see *America's Volunteers—A Report on the All-Volunteer Armed Forces* 190 (Dec. 31, 1978)).

Furthermore, even if the Chapter 6 standards were invoked, ¶ 6-2 limits induction thereunder "to personnel categories as directed." The Department of Defense advises us that that paragraph contemplates the induction of lower profile individuals only in the event of a need for selected skills that could be supplied by persons with physical impairments that would not preclude adequate performance of their duties.

Finally, appellees misconstrue the Army regulations as providing that profile 3 individuals are non-

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tion) resulting from action by Congress or the President to mobilize Reserve Component units and/or individual reservists * * *." Reservists were mobilized during both the Korean War and the Vietnam conflict.

[5] We are advised by the Department of Defense that no individuals with serial 3 ratings were conscripted during those conflicts.

combat assignable. There is no basis for that assumption. A review of the particular limitations that can attach to serial 3 registrants (AR 40-501, ¶ 9-5 Chart) reveals that while such registrants are unable to fill some combat or close combat support roles, they are available for others.[6] Thus, male registrants with even serial 3 profiles can be deployed to combat and combat support roles, and hence would be more readily transferable to a wider variety of assignments than higher profile women made ineligible for such positions by law or policy.

In sum, while there are provisions for exceptions—which might or might not be invoked—the rule generally obtains that the men who ultimately are inducted are those who are physically capable of performing a broad range of combat assignments, while those who are physically unsuited for such assignments are excluded through the classification process.[7]

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[6] For example, the only limitation on a profile "3," code "L" individual is that he not be assigned a position that requires daily exposure to extreme cold.

[7] Appellees also suggest (Br. 11 n.28) that the male-only draft registration does not reduce to a distinction between the combat-fit and the combat-unfit because close combat assignments, "such as infantryman," require scores of "1" on every PULHES factor in order to "meet Army qualification standards," citing AR 611-201, at 3-11-6. This argument is not persuasive. First, the standards contained in AR 611-201 are simply guidelines, which merely reflect that, given currently available personnel, the fittest are to be placed in the most demanding assignments. The regulations themselves "*emphasize*[] *that the physical profile serials associated with the various MOS* [*military occupational specialties*] *are*

An analogous general rule obtains with respect to women's ineligibility for combat assignments (see our opening brief at 21-22). As we noted in our opening brief (at 22 n.19), women presently are assigned to combat support and combat service support units in divisions, including maintenance battalions, signal battalions, brigade level headquarters and certain artillery units. It is not in those positions, however, but rather in the close combat positions from which women are, by statute and policy, "categorically excluded" that Congress expected the most critical shortages to occur in the event of mobilization. Accordingly, it is entirely accurate to describe the exclusion of women from registration as the exclusion of those who are ineligible to perform the combat duties for which an emergency draft is expected to be required.[8]

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*guides*. While less than ideal, personnel with lower physical profiles may be used." AR 611-201, ¶ 1-10*b* (emphasis in original). Furthermore, appellees' assertion is factually incorrect. The very infantryman standard upon which they rely has been relaxed to permit the inclusion of a serial "2" in the profile. AR 611-201, Change 15 at 3-11-6 (Feb. 15, 1981).

[8] Appellees also attempt to disprove the existence of a combat eligibility criterion by pointing out (Br. 9), as we noted in our opening brief (at 23 n.22), that the MSSA provides (50 U.S.C. App. 456(j)) for the actual induction of conscientious objectors who are not opposed to participation in noncombat service. Preliminarily, conscientious objectors who fail to qualify for induction under the physical standards discussed above are excluded from induction on that broader ground. More specifically, the obvious purpose behind inducting physically able conscientious objectors for noncombat service is to discourage registrants from fraudulently apply-

b. Appellees further contend (Br. 14-16) that even if the male-only draft is based on women's ineligibility for combat, rather than on gender alone, that fact should bear only on the question of whether the applicable constitutional standard has been met, and not on the question of what standard should be applied. But if the basis for the challenged classification is something other than gender, there is no occasion for a court to apply the intermediate level of scrutiny that has been developed for use in that context. Hence, contrary to appellees' prediction (Br. 16), application of the rational relation test in the present case would not mean that "[w]henever gender was argued to stand as a surrogate for any other trait, we would retreat to minimal scrutiny, overruling a decade of decisions in the process."

This is not a case in which gender merely is "argued to stand as a surrogate" for combat ineligibility. Rather, as we showed in our opening brief (at 29-37), in limiting registration to males Congress itself focused on the combat-eligibility criterion. Moreover, the present case bears no resemblance to those relied on by appellees at page 15 of their brief, in which the only factors offered in justification of the challenged classifications were themselves sexual stereotypes or generalizations. Here, rather, as a re-

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ing for conscientious objector status with the objective of avoiding military service altogether.

Finally, the "doctors draft" represented an exceptional response to unique military needs. In any event, as appellees note (Br. 9 n.20), authorization for the "doctors draft," along with the statutory power to induct, has expired, and there is no assurance that it would be revitalized in the event that the general statutory power to induct were re-enacted (no doctors (as such) would be drafted under the general provisions of the MSSA at issue in this case).

sult of unchallenged statutory and policy restrictions, women are ineligible for combat assignments. Male-only registration, when properly viewed together with the concomitant classification and induction processes, thus reduces, as a matter of fact, to a distinction between the combat-fit and the combat ineligible.[9] Accordingly, as is more fully discussed in our opening brief at pages 21-23, under this Court's decisions in *Schlesinger* v. *Ballard*, 419 U.S. 498 (1975), and *Geduldig* v. *Aiello*, 417 U.S. 484 (1974), the male-only draft system is not a classification based only on gender, and hence does not warrant application of an intermediate level of scrutiny. Cf. *Schweiker* v. *Wilson*, No. 79-1380 (Mar. 4, 1981) slip op. 11-12.[10]

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[9] Amici Women's Equity Action League Educational and Legal Defense Fund, *et al.*, argue (at 21-26) that the male-only draft registration may not be upheld on the basis of the statutes and policies that exclude women from combat positions because, they assert, those provisions are facially discriminatory and, therefore, presumptively unconstitutional. Amici's argument, however, is wholly inconsistent with this Court's approach in *Schlesinger* v. *Ballard*, 419 U.S. 498 (1975). In that case, the Court upheld a distinction between the mandatory discharge provisions for male and female naval officers on the basis of combat restrictions on navy women (10 U.S.C. 6015), which, the Court noted, had not been challenged. 419 U.S. at 508.

Furthermore, it would be unfair to the government to preclude it from relying on statutory and policy restrictions that, up to this point in the litigation, have not been challenged as a result of appellees' chosen litigation strategy—to prove that "male-only registration is unconstitutional even assuming limitations on women in combat" (Appellees' Br. 1-2 n.2).

[10] Appellees contend, however, that the Court has never applied this mode of analysis to a statute that classifies expressly on the basis of gender, as the MSSA does. We submit, as we did in our opening brief (at 21-23), that just

3. In point II of our opening brief, we showed how Congress' decision to limit the draft registration to men substantially furthers the important governmental interest in meeting effectively the Nation's emergency military needs (opening brief at 29-38). In response, appellees argue first that whether or not the military *needs* women is constitutionally irrelevant, and second that the inclusion of women in the draft registration scheme would enhance military flexibility. Neither argument is persuasive.

Appellees' characterization (Br. 20) of the military need question as "[w]hether or not an all-male (or all white or all black) pool of registrants or stream of inductees would be sufficient to meet military needs * * *" is inaccurate. Congress did not conclude that there was no military need to draft women simply because men were available in their stead, but rather because the anticipated military need was for persons eligible for combat assignments and because the evidence showed that there were sufficient numbers of volunteer women available to staff the positions for which they were eligible (opening brief at 29-33). Furthermore, Congress did not stop at its conclusion that there was no affirmative need to

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such an analysis played a part in this Court's decision in *Schlesinger* v. *Ballard, supra,* which involved an express distinction between male and female naval officers. Moreover, in the same way that an ostensibly neutral statute may be an obvious pretext for invidious discrimination (see, *e.g., Yick Wo* v. *Hopkins,* 118 U.S. 356 (1886)), so may a facially gender-based provision be based on a purely neutral criterion, when the legislative history shows that Congress' intent was gender-neutral and when the effect of the entire statutory scheme, of which the gender-based provision is a part, is similarly gender-neutral.

draft women, but went on to conclude that substituting women for men in a finite pool of inductees would detract from military flexibility and emergency preparedness (*id.* at 34-38).

Appellees respond to that further conclusion by selectively quoting from testimony and suggesting possible uses of female inductees that might have supported Congress' reaching a different decision.[11] The existence of conflicting evidence, however, does not negate the substantial body of evidence on which Congress chose to rely. Moreover, appellees focus largely on statements favoring the *registration* of women. But the same witnesses who testified in favor of *registering* women, uniformly opposed *drafting* them (opening brief at 31-32). And, as we showed in our opening brief (at 26-28 & n.24), Congress refused to separate the two issues. When registration is properly regarded as the first step in the conscription process, only the latter testimony is probative.

4. Unable to refute the evidentiary basis for Congress' recent refusal to expand the MSSA to include women or to approve funding for the registration of women, appellees and amici Kastenmeier, *et al.*,

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[11] For example, appellees suggest (Br. 21-22) that in the first days of an "all-out" war in Europe between the NATO nations and the Warsaw Pact nations, female draftees could "free up" individuals already in the military and stationed in the United States to be sent overseas without the requisite twelve weeks of training. We are advised by the Department of Defense, however, that in its judgment mobilization needs would best be served by delaying the accession of even volunteer women (except those with especially needed skills) until at least 60 days after mobilization, so that the examining stations would be available first for the examination of men, because of their eligibility for assignment to the crucial combat positions.

finally would have this Court ignore altogether the extensive legislative history underlying those decisions as mere "litigation-inspired afterthoughts" and "after-the-fact rationalizations" (Appellees' Br. 31-32).[12] Specifically, appellees and amici first would discard H.R.J. Res. 521, 96th Cong., 2d Sess. (1980), which authorized the transfer of funds to the Selective Service System for the registration of men, as merely a funding measure, and then would discount the Specific Findings adopted by both Houses of Congress in connection with their passage of the 1981 Defense Authorization Act as superfluous because H.R.J. Res. 521 already had authorized the necessary transfer of funds.[13] This attempt artificially to splinter and denigrate what was a substantive reconsideration and, in effect, a reenactment of the male-only draft registration mechanism based on present defense mobilization needs (see our opening brief at 28 n.25) cannot succeed.[14]

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[12] Even the district court recognized that the legislative history accompanying the renewal of registration and the rejection of proposals to register women should be taken into account (see J.S. App. 23a-28a), although, we submit, it failed to accord the proper weight to that history.

[13] Appellees and amici also seek to portray the Specific Findings as having been prepared in response to a government request suggesting that supporting legislative history would be necessary for the defense of this case (Br. 31-32; Amici Br. 20-21 & n.14, 24). It is a sufficient response to point out that the substance of the findings contained in S. Rep. No. 96-826, 96th Cong., 2d Sess. (1980), had been set forth in the 1979 report of the Senate Armed Services Committee, S. Rep. No. 96-226, 96th Cong., 1st Sess. 8-9 (1979), which was issued well before the testimony on which appellees and amici rely.

[14] Indeed, until Congress authorized the transfer of funds to the Selective Service System to begin registration, the MSSA was essentially dormant (see our opening brief at 3-4 n.1).

*TVA* v. *Hill*, 437 U.S. 153 (1978), on which appellees and amici Kastenmeier, *et al.*, rely, does not avail them. In that case, this Court merely held that appropriation measures for TVA's Tellico Dam Project could not be regarded as an implied repeal of the Endangered Species Act of 1973 as it applied to the dam because, *inter alia*, the legislative history of actions of the appropriations committee were not indicative of the meaning of the Endangered Species Act, which had been reported out of a different committee. In so holding, the Court pointed out (*id.* at 192) that there was "no indication that Congress as a whole was aware" of the implications of the appropriation measures for the Endangered Species Act.

Here, of course, no question of repeal by implication is involved. Rather, there was a revitalization and a refunding of an extant, but dormant, statute on the basis of newly developed and articulated military considerations.[16] Nor is the proposition urged on this Court by appellees (Br. 34)—that appropriations legislation "does not * * * affect previously enacted substantive law"—an absolute rule. Rather, each appropriations measure must be evaluated on its facts and with an eye to discerning actual congressional intent. See generally, *Greene* v. *McElroy*, 360 U.S.

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[16] Moreover, Congress knew exactly what it was doing when it refused to require the registration of women. Contrary to appellees' assertion (Br. 33; emphasis in original) that "[a]t no point * * * did Congress take a single step to *prevent* the expenditure of funds on the registration of women," as we noted in our opening brief (at 6-7 n.7), on a number of occasions in various congressional forums the substantive question of authorizing the registration of women was considered and rejected.

474, 504-505 & n.30 (1959); *Ex parte Endo*, 323 U.S. 283, 303 n.24 (1944).[16]

At all events, the most detailed legislative history, the Specific Findings contained in S. Rep. No. 96-826, 96th Cong., 2d Sess. (1980), did not attend a mere appropriations decision. To the contrary, those findings were generated by the Senate Committee with substantive jurisdiction over the Military Selective Service Act in connection with its consideration of whether to amend the Act to provide for the registration of women, and they were ultimately endorsed by both Houses of Congress in connection with the passage of the Department of Defense Authorization Act, 1981, Pub. L. No. 96-342, 94 Stat. 1077.[17]

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[16] Here, H.R.J. Res. 521 was inextricably bound to the substantive reconsideration of the MSSA described *infra*, as is illustrated by the Senate Appropriations Committee's explanation of why it transferred to the Selective Service System less than the total amount that the President had requested: "Of this total [requested by the President], $8,500,000 for the registration of women has been deferred by the administration pending the passage of legislation authorizing the registration of women." S. Rep. No. 96-789, 96th Cong., 2d Sess. 1 n.1 (1980). Moreover, as we noted in our opening brief (at 7 n.7), during floor consideration of H.R.J. Res. 521 in both the House and Senate proposals to require funding for the registration of women as well as men were raised and rejected. 126 Cong. Rec. H2728-H2729, H2747 (daily ed. Apr. 22, 1980); 126 Cong. Rec. S6527-S6549 (daily ed. June 10, 1980).

[17] As amici Kastenmeier, *et al.*, note (at 10 n.7), there is a distinct difference between authorizing legislation and appropriations measures. Authorizing legislation is generated by a committee with jurisdiction over a particular subject matter (*e.g.*, the Senate Armed Services Committee), and constitutes basic, substantive legislation approving the specific programs for which funding will be required. Appropriations measures, on the other hand, merely provide the funding for the pre-

As we noted in our opening brief (at 6 n.7), at approximately the same time that the appropriations committees of the House and Senate were considering H.R.J. Res. 521,[18] the Subcommittee on Military Personnel of the House Committee on Armed Services, the Subcommittee on Manpower and Personnel of the Senate Armed Services Committee, and the full Senate Armed Services Committee were considering proposals to amend the MSSA to provide for the registration of women.[19] On June 3, 1980, the Senate Armed Services Committee rejected a proposal (S. 2440, 96th Cong., 2d Sess. (1980)) that would have required the registration of women under the MSSA. The committee adopted Specific Findings explaining

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viously authorized programs. Hence, amici's reference to the 1981 Defense Authorization Act, Pub. L. No. 96-342, which arose out of the House and Senate Armed Services Committees, as "the current defense [appropriations] act" (Amici Br. 9; see also Appellees' Br. 32) is erroneous. Pub. L. No. 96-342 considered on their merits and authorized major weapon systems, defense-related research programs and civilian and military personnel levels, and set a ceiling on the funds that could be appropriated to support those programs and levels in fiscal year 1981. The actual appropriation of funds, however, was accomplished by an entirely separate act, Department of Defense Appropriation Act, 1981, Pub. L. No. 96-527, 94 Stat. 3068.

[18] The House passed H.R.J. Res. 521 on April 22, 1980 (126 Cong. Rec. H2752 (daily ed. Apr. 22, 1980)), and the Senate passed it on June 12, 1980 (126 Cong. Rec. S6773 (daily ed. June 12, 1980)).

[19] On March 6, 1980, the House Subcommittee tabled H.R. 6569, 96th Cong., 2d Sess. (1980), which would have amended the MSSA to permit the registration of women. Legislative Calendar, House Comm. on Armed Services, 96th Cong., 2d Sess. 53 (Sept. 30, 1980). The full House Committee never considered the measure.

the reasons for that decision in its report on the Fiscal Year 1981 Defense Authorization Bill, which the committee amended to include a provision authorizing the transfer of $13.3 million to the Selective Service System to begin the registration of men. Thereafter, the House-Senate conferees on the Authorization Bill specifically endorsed the Senate Armed Services Committee's Findings, S. Conf. Rep. No. 96-895, 96th Cong., 2d Sess. 100 (1980), and both Houses of Congress adopted the Specific Findings by passing the Conference Report. 126 Cong. Rec. H7800, S11646 (daily ed. Aug. 26, 1980).[20]

Finally, appellees and amici attempt to discredit the Specific Findings as the "Congressional equivalent of *obiter dictum*" (Appellees' Br. 33) on the ground that the Senate ultimately receded from its amendment authorizing the transfer of funds to the Selective Service System because that already had been accomplished by H.R.J. Res. 521. See S. Conf. Rep. No. 96-895, *supra*, at 100. It was in the *very next line* of the Conference Report, however, that the conferees expressly "endorse[d] the Specific Findings on registration of women contained in the Senate report" (*ibid.*). Thus, regardless of whether that statement be deemed "Congressional * * * *dictum*," it unequivocally expressed Congress' intent to retain the male-only draft registration because the present mobilization deficiencies are concentrated in the combat arms, and because women, by current law and policy, are not eligible to meet those needs. See S. Rep. No. 96-826, *supra*, at 160-161.

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[20] In view of the adoption of the Conference Report by both Houses of Congress as well as the other bicameral consideration of measures requiring the registration of women (see our opening brief at 6 n.7), there is no basis for appellees' reliance (Br. 34-35) on language disapproving the one-house veto in *Chadha* v. *INS*, 634 F.2d 408, 434-435 (9th Cir. 1980).

For the foregoing reasons and those stated in our opening brief, the judgment of the district court should be reversed.

Respectfully submitted.

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